(16)

No. 690

FILED
DEC 15 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

PAUL PATTERSON ET UX., *Petitioners,*

v.

W. E. PEEL, *Respondent.*

PETITION FOR REHEARING

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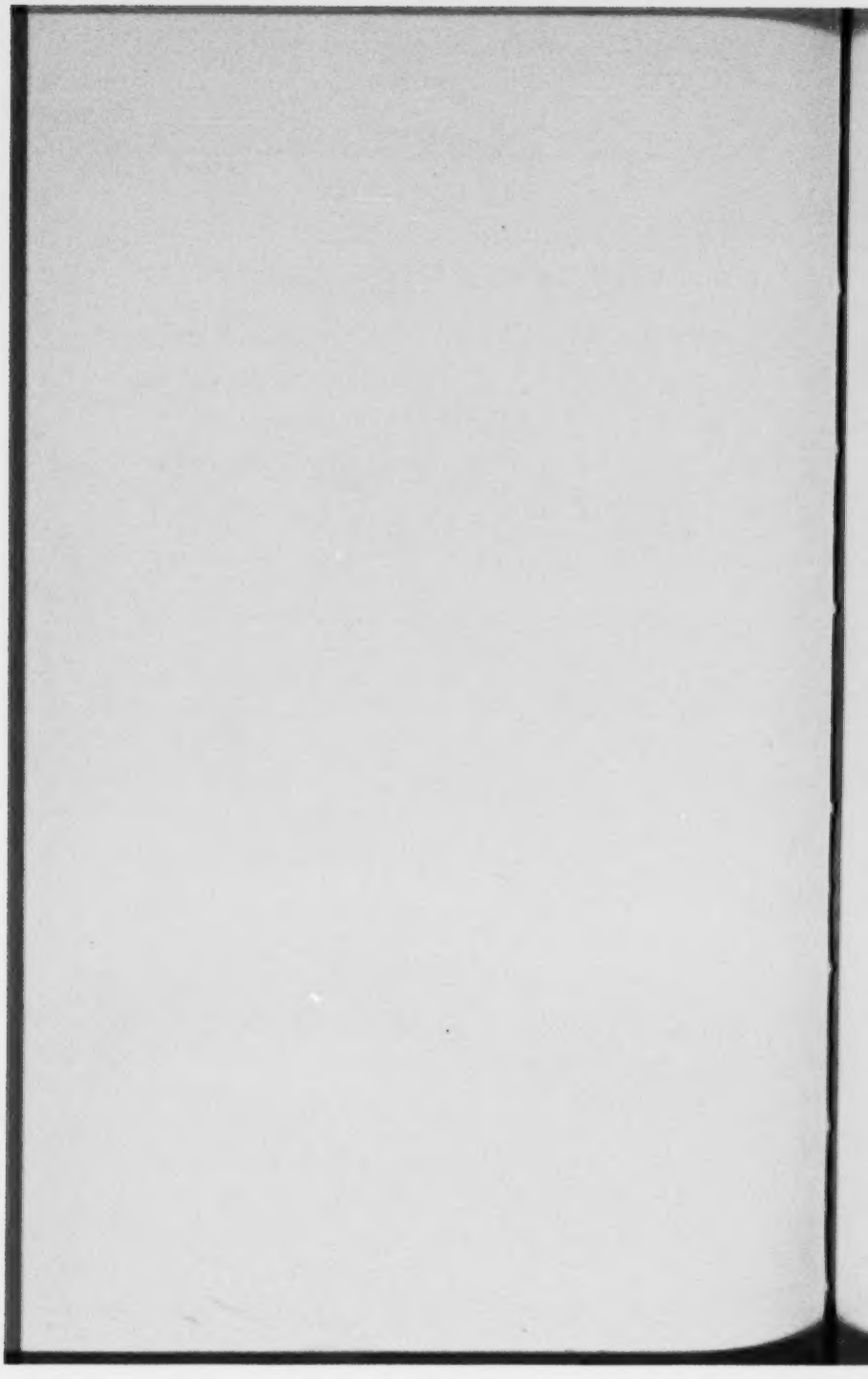

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PETITION FOR REHEARING

To the Honorable Supreme Court of the United States:

Come now Paul Patterson and Mrs. Paul Patterson, ~~son~~, petitioners in the above entitled cause, and present this, their petition for rehearing of the above entitled cause, and, in support thereof, respectfully show:

That the judgment of the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas resulted from proceedings in which that Court, by giving conclusive effect to the finding and judgment in a prior case to which petitioners were neither parties nor in privity with a party therein, takes petitioners' land and home in violation of the due process clause of the

Fourteenth Amendment to the Constitution of the United States.

Petitioners were in possession of the land in controversy, had constructed improvements thereon, and had occupied it as their home for a long time prior to respondent's suit in trespass to try title. (R. 45.) Petitioners have a deed to the land as a part of Washington County Railroad Survey No. 13 (R. 25), which, by the field notes in its patent, covers the land in controversy. (R. 8.) Respondent claims the land as a part of the junior Evantha Scurry Survey. (R. 2 and 14.)

It was petitioners' contention throughout the proceedings that the junior Scurry Survey was north of Washington County Railroad Survey No. 13, and did not cover the land in controversy. (R. 22.)

The judgment of the trial court was not supported by the jury's verdict upon which it was rendered, since there were no findings in the verdict by which the ground location of the senior Washington County Railroad Survey No. 13 could be fixed (R. 16-19), and there was no evidence in the record which would have supported a finding by the jury that the senior Washington County Railroad Survey No. 13 does not cover the land in controversy (R. 21-22), and there was no finding by the jury fixing the disputed location of the south line of the junior Scurry Survey as attempted by the trial court's judgment. (R. 16-19.) Under the well established rule in Texas, the trial court's judgment could not be affirmed upon this record, as held in the case of *Southern Pine Lumber Co. v. Whiteman,* 104 S. W. (2d) 635, in which the judgment of the

rt was reversed and remanded. In that case
t said:

The verdict of the jury in this case did not it-
locate, nor furnish the means of locating, the
uted boundary line on the ground. * * *
s necessary to describe the disputed line by
rence to objects concerning which there can
o controversy and the verdict of the jury must
ce their findings with reference to such ob-
s."

ourt further said:

The conclusion stated is further compelled,
think, by the operation of the principle that
e the judgment of a court must conform to the
lict, if any, the judgment cannot include mat-
which are a part of the subject-matter upon
ch the verdict speaks, but not embraced in
verdict."

e case of *McCurdy v. Bullock,* 20 S. W. 1110,
rt applied this rule and held as follows, quot-
n the syllabus:

Where the verdict in trespass to try title is
explicit as to the location of a disputed bound-
, the judgment entered thereon, which estab-
es the boundary, is incorrect."

it was necessary for respondent, as plaintiff,
r to recover on his claim under the junior
Survey, to produce evidence and have a jury
thereon locating the senior Washington Coun-
oad Survey in a position so that it would not
ny part of the land in controversy, which he did
presents another reason that the judgment of

the trial court could not be upheld on appeal upon the record in this case, under the rule stated by the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas in the case of *Taylor v. Higgins Oil & Fuel Co.,* 2 S. W. (2d) 288, as follows:

> "They were the plaintiffs in this case and can recover only upon an affirmative showing of title. That is to say, the burden rested upon them of showing a location of the west boundary line that would leave in existence the tract of land in controversy."

The validity of the trial court's judgment rested entirely upon the senior Washington County Railroad Survey No. 13 not covering any part of the land in controversy, because, to the extent that the junior Scurry Survey might conflict with a senior survey, it would invalidate, to that extent, any record title under the junior survey, and under the record in this case respondent could not have possibly matured a limitation title on account of the occupancy of petitioners and the grantor in their deed, a record owner in the senior Washington County Railroad Survey No. 13; exclusive possession being necessary in order to mature a limitation title, as held by the Supreme Court of Texas in *Richards v. Smith,* 67 Tex. 610, 4 S. W. 571, in the following language:

> "When the acts done upon a tract of land are such as to give unequivocal notice to all persons of a claim to it adverse to the claim of all others, and this is accompanied by an actual possession, exclusive in its character, then limitation will run in favor of the persons so asserting adverse claim, and enjoying an exclusive possession from the

time such exclusive occupancy began, whether the land be inclosed or not."

Petitioners perfected an appeal to the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas, which court, under our procedure, has authority to pass upon both law and facts and render such judgment as should have been rendered by the trial court, but the Court of Civil Appeals refused to duly consider petitioners' assignments of error attacking the judgment of the trial court, and refused to review the evidence in the record supporting these assignments because of the theory and holding of the Court of Civil Appeals that the judgment and findings in the case of *State et al. v. Humble Oil & Refining Co. et al.,* 128 S. W. (2d) 424, were binding upon petitioners on the principles of *stare decisis.* (R. 24) While it is true that the due process clause of the Fourteenth Amendment does not guarantee the right of appeal, yet when an appeal is allowed to review a judgment which cannot stand upon the record in the case and the appellate court refuses to consider the evidence and affirms the unsupported judgment by giving conclusive effect to the findings and judgment in a prior case, in which the appellant was neither a party nor in privity with a party therein, this, we believe, is a denial of due process.

The recent case of *Hansberry v. Lee,* 311 U. S. 32, 61 Sup. Ct. 115, 85 L. Ed. 11, involved the question as to whether the Supreme Court of Illinois, by its adjudication that petitioners in that case were bound by a judgment rendered in an earlier litigation to which

they were not parties, had deprived them of the due process of law guaranteed by the Fourteenth Amendment, this Honorable Court, in reversing the case, said:

> "State courts are free to attach such descriptive labels to litigation before them as they may choose and to attribute to them such consequences as they think appropriate under state constitutions and laws, subject only to the requirements of the Constitution of the United States. But when the judgment of a state court, ascribing to the judgment of another court the binding force and effect of *res judicata,* is challenged for want of due process, it becomes the duty of this Court to examine the course of procedure in both litigations to ascertain whether the litigant whose rights have thus been adjudicated has been afforded such notice and opportunity to be heard as are requisite to the due process which the Constitution prescribes."

It will be noted that the opinion and holding of the Court of Civil Appeals in this case is entirely predicated upon the theory that petitioners are concluded by the findings and judgment in the case of *State v. Humble Oil & Refining Co., supra,* which decision was an affirmance of the trial court's judgment based upon jury findings on conflicting evidence, and in which petitioners were given no opportunity to present evidence and be heard.

We recognize the rule obtaining in Texas, called doctrine of *stare decisis,* that subsequent applicants for state lands claimed to be vacant are bound by prior decisions of the Texas Supreme Court fixing boundaries which are binding upon the State, as

held in the case of *Eppenauer v. Ohio Oil Co.*, 98 Fed. (2d) 524, which appears to have resulted from the Texas courts confusing *stare decisis* with *res judicata*, for if a judgment is binding upon the State, it would be binding upon a subsequent applicant seeking to acquire land from the State under the doctrine of *res judicata*. Prior to the decision in the case at bar, we have been unable to find a Texas case which has gone to the extent of holding that a judgment rendered on a jury's verdict upon issues of fact, like the case of *State v. Humble, supra*, in which a writ of error was refused by the Supreme Court of Texas, is binding under the doctrine of *stare decisis* upon those who were neither parties nor in privity with the judgment in that case. On the other hand, it seems to be the uniform holding of Texas courts that the doctrine of *stare decisis* has reference only to questions of law, as stated by the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas in the case of *McDonald v. Humble Oil & Refining Co.*, 78 S. W. (2d) 1068.

The correct rule in Texas seems to be accurately stated in the case of *Horne v. Moody*, 146 S. W. (2d) 505, as follows:

> "As we understand the rule of *stare decisis* in this State it is one of precedent and authority. It is based upon the statement of a principle, rule or proposition of law by the Supreme Court or the highest court in the State having jurisdiction of the particular case. In a boundary suit the adoption of a particular legal proposition, such as a rule of construction, generally results in a judgment establishing a certain boun-

> dary. The doctrine of *stare decisis,* however, is based upon the legal principle or rule involved and not upon the judgment which results therefrom. In this particular *stare decisis* differs from *res judicata,* which is based upon the judgment."

Any other application of the doctrine of *stare decisis* would seem to do violence to due process.

It will be noted that the only rules or principles of law mentioned in the opinion in the case of *State v. Humble, supra,* are as follows:

> "And the cardinal rule in locating such sursurveys is to follow the footsteps of the surveyor on the ground if they can be found. If they cannot be found with certainty, all the surrounding facts and circumstances should be looked to in arriving at the purpose and intent of the surveyor, and so construed and applied as to carry into effect the most probable intent of the parties to the grant."

Had the Court of Civil Appeals applied the foregoing rules to the evidence in the case at bar, the judgment of the trial court could not possibly have been affirmed. On the other hand, the court has undertaken to extend the doctrine of *stare decisis* to what the Court said in discussing the conflicting evidence in the opinion in the case of *State v. Humble, supra,* which does not indicate the establishment of the ground location of any boundary, by law or otherwise.

What we believe to be the correct Texas rule applicable to this case was applied in the case of *Dunn v. Land,* 193 S. W. 698, in which the court said:

> "The failure of parties to introduce testimony in a case cannot affect the rights of parties claiming other lands, and in this case the rights of Dunn can not be affected by the fact that meager testimony was introduced in a case between other parties, or even by the fact, had it existed, that a jury in another case on testimony not conclusive, had found against his contention. * * * *The decision itself* (Schaefer v. Berry, 62 Texas 705) *was inadmissible, and could affect no rights of the parties in this case,* * * * and this case should be tried on the evidence introduced therein entitled to probative force, and not upon the failure of parties in another suit to adduce testimony." (Emphasis ours.)

If we are correct in the view that the refusal of the Court to consider evidence is the same in effect as denying an opportunity to be heard or denying the right to introduce evidence and have judicial findings based thereon, then the force of the evidence becomes immaterial under the holding of this Honorable Court that "To one who protests against the taking of his property, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits." *Coe v. Armour Fertilizer Works,* 237 U. S. 413, 426.

Based upon the foregoing rule, we did not deem it necessary to encumber the record with all of the evidence, especially since respondent has never questioned the correctness of the statements contained in the petition for writ of certiorari, and regardless of what the evidence was, the Court of Civil Appeals

refused to consider it. If the decision of the Court of Civil Appeals is permitted to stand as a precedent, "certainly no man's rights can be safe under such a rule of law," as said by Justice Shaw in his dissenting opinion in the case of *Lee v. Hansberry,* 372 Ill. 369, 377, 24 N. E. (2d) 37, 41, which was reversed by this Honorable Court in *Hansberry v. Lee, supra.*

WHEREFORE, petitioners pray that this Honorable Court set aside its order denying their petition for writ of certiorari and grant a rehearing thereon and, upon such rehearing, grant their petition and issue writ of certiorari to the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas.

Respectfully submitted,

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W. P. MCCOMB,
Counsel for Petitioners.

I, counsel for the above named petitioners, do hereby certify that the foregoing peteition for rehearing of this cause is presented in good faith and not for delay.

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